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06/12/07

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 80/2005

APPELLANT Khilawan Prasad

VERSUS

RESPONDENT State of Chhattisgarh

Judgment post for 05-12-2007

Sd/-
DHIRENDRA MISHRA
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 80/2005

APPELLANT (IN JAIL) Khilawan Prasad son of Santosh Bhat, aged about 20 years, resident of Champa, Police Station Neora, District Raipur (CG)

VERSUS

RESPONDENT State of Chhattisgarh, through Police Station, Neora, District Raipur (CG)

PRESENT: Shri M.K. Bhaduri, Advocate for the appellant.
Shri Aron Sao, Govt. Advocate, for the State.

JUDGMENT
05-12-2007

Dhirendra Mishra, J

This criminal appeal is directed against the judgment of conviction and order of sentence dated 22nd January, 2005 passed in S.T. No. 379/2004 whereby learned 11th Additional Sessions Judge, (FTC), Raipur has convicted the appellant under Section 363, 366 and 376 of I.P.C. and sentenced him to undergo R.I. for 7 years with fine of Rs. 1000/- and in default of payment of fine, to further undergo R.I. for 4 months on each count. All the sentences have been directed to run concurrently.

2. Case of the prosecution, in brief, is that on 14-8-2004 complainant Samaruram lodged report of Ex. P-3 in Police Station Neora mentioning therein that he resides with his wife, two daughters and son in village Chova. On 9-8-2004 at about 3.30 when he returned from field, his wife Saroj informed that his daughter-the prosecutrix is missing whereupon he searched for her. Appellant Khilawan, aged 20 years resides in front of his house. He has eloped with her on the inducement of marriage and has gone to Raipur. His daughter is minor. The prosecutrix was given in the custody of her father Samaruram vide Ex. P-7. The prosecutrix was sent for medical examination to Government Hospital, Neora where Dr. Sudha Samuel (P.W. 11) examined her and gave report of Ex. P-11. The appellant was also sent for medical examination and his MLC report is Ex. P-9. Copy of the admission register of the prosecutrix was taken into possession vide seizure memo of Ex. P-4. Copy of duplicate transfer

certificate was also seized vide Ex. P-14. After completing investigation, charge sheet was filed.

3. During trial, the prosecution examined 12 witnesses in all. Thereafter statement of the accused was recorded in which he denied the evidence appearing against him in the prosecution case and pleaded innocence and false implication. However, the trial Court after hearing the counsel for respective parties, convicted and sentenced the appellant as mentioned in para 1 of this judgment.

4. Learned counsel for the appellant submitted that the age of the prosecutrix has not been proved by the prosecution that she was minor. The trial Court relying upon seizure memo of admission register of Ex. P-4 and transfer certificate of Ex. P-14, which has been proved by Vijay Kumar Dhruva (P.W. 10) has held that date of birth of the prosecutrix was 15-3-1989, though the copy of the admission register has not been proved and document of transfer certificate is not a conclusive prove of date of birth. He further argued that the prosecutrix (P.W. 8) accompanied the appellant to various places of her own freewill and she was a consenting party. She has contradicted her diary statement of Ex. D-1 on material particulars and the trial Court ignoring her previous statement has based the conviction on the statement of the prosecutrix which is contrary to the evidence available on record. Reliance is placed in the matter of **State of Karnataka –v- Suresh Babu Pukraj Porral**[1], **Jinish Lal Shah –v- State of Bihar**[2], **Lekharam Judhauan Lodhi -v- State of M.P.**[3], and **Gurdaniya –v- State of MP**[4].

5. On the other hand, learned counsel for the State has supported the impugned judgment and contended that date of birth of the prosecutrix has been duly proved by the prosecution and according to which, on the date of incident she was less than 16 years of age. She has categorically stated that the appellant induced her on the promise of marriage and committed rape with her against her wish and thereby abducted her from lawful guardianship and committed sexual intercourse with her on the promise of marriage.

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[1] 1994(1)MPWN - 225
[2] 2003(1) CGLJ 138
[3] 1998(2) MPLJ - 30
[4] 1987(I) MPWN - 224

6. I have heard learned counsel for the parties. I have perused the record as also the impugned judgment.

7. The first question to be considered is whether the prosecution has been able to establish that the prosecutrix was less than 18 years on the date of incident ?

8. P.W. 10 Vijay Kumar Dhruva, In-charge Head Master of the school has deposed that the admission register of the school was produced by him in the police station Neora and the same was seized vide seizure memo of Ex. P-4 and after seizure, the original was returned to him after obtaining photo copy and in the said register, name of the prosecutrix is mentioned at Sr. No. 741. Her date of birth is mentioned as 15-3-1989. He has further stated that on 15-8-2004, a duplicate school transfer certificate of the prosecutrix of Ex. P-14 was issued by him. In the cross-examination, this witness has stated that father of the prosecutrix had come for her admission and he orally told her date of birth which was entered by him in the admission register. He did not produce any birth certificate/affidavit or any certificate issued by Kotwar. He had again given copy of transfer certificate to the uncle of the prosecutrix Puneetram. The transfer certificate was not seized from him and the same was issued without producing challan which is required as per rules.

9. P.W. 2 Samaruram is father of the prosecutrix. He has deposed that the prosecutrix is his 3rd daughter. He got married in the year 1984. First daughter was born in the year 1985. All the 4 children were born at interval of one year. His birth year is 1967. He married his elder daughter two years back after she completed 18 years. In paragraphs 7 and 8, he has admitted that his daughter was born in Tilda and her date of birth is entered in the municipal record however he has not received any certificate from municipality and he had sworn any affidavit at the time of enrolling his daughter, and he has no information as to on what basis he got his daughter admitted in the school and it is incorrect to say that he gave date of birth of his daughter by guessing.

10. In the matter of **State of Karnataka –v- Suresh Babu Pukraj Porral**[1], age of prosecutrix, according to prosecution, was 15 years at

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the time of occurrence, entry of date of birth was made on the basis of the information given by the parents whereas radiologist assessed the age between 16 to 18 years, in these circumstances, it was held that age of the prosecutrix was doubtful, she accompanied the accused to different town where she lodged with him, there was no specific allegation about intercourse and thus offence is not made out. It was also held that age of the prosecutrix was not specifically fixed and when age is in doubt, the question of taking out from guardianship is not made out.

11. In the matter of **Jinish Lal Shah**[2] on the basis of statement of father, age of the prosecutrix was assessed as 19 years on the date of incident and in these circumstances, it has been held that the prosecution has to prove that the girl was minor and under Section 366, I.P.C., the prosecution is required to prove that the girl was compelled to marry the accused against her will and/or was forced to or induced to intercourse against her will.

12. In the matter of **Lekhram**[3], it has been held that entries in the school admission register are not conclusive evidence of date of birth.

13. In the matter of **Gurdaniya**[4] also, considering that the prosecutrix resided with accused for a considerable time and in this time, the prosecutrix not complaining anything against the accused to anybody, it has been held that no offence is made out under Sections 363, 366 and 376 of I.P.C.

14. In the light of the above judgments, if we examine the facts of the present case, we note that P.W. 10 Vijay Kumar Dhruva has proved the document of seizure memo of Ex. P-4 by which the admission register was seized. Neither the original admission register was produced during trial nor photo copy has been proved on the basis of original register. Though this witness has stated that in the said register, the date of birth is entered as 15-3-1989 at Sr. No. 741. Copy of the duplicate transfer certificate is also prepared on the basis of entry in the school admission register of Ex. P-14 which has not been proved during trial. P.W. 2 Samaruram has not mentioned the date of birth of the prosecutrix. In para 3, he has stated that he was married in the year 1984 and his elder daughter was born in the year

1985 and the prosecutrix is his 3rd daughter and they were born in the interval of one year. If the above statement is considered, in that case, the date of birth of the prosecutrix comes to year 1987. He has further stated that he married his elder daughter two years back after she completed 18 years and she is blessed by a child. Thus in the year 2002, his daughter was 18 years old as this witness is examined 22nd December, 2004. In that case, the date of birth of his elder daughter comes to sometime in the year 1984 and in that case, the possibility of the prosecutrix's date of birth in the year 1986 cannot be ruled out in view of the statement of her father Samaruram. From the evidence available on record, it is clear that the prosecution has not been able to specifically fix the age of the prosecutrix and before recording conviction under Section 363 of I.P.C. it is the duty of the prosecution to establish that the prosecutrix was of more than 18 years and finding of the trial Court in this regard that she was less then 18 years on the date of incident is not based on proper appreciation of evidence.

15. The prosecutrix (P.W. 8) has deposed that she had gone to attend the call of nature where the appellant and his father threatened her and asked her to accompany the accused or else she would be beaten and thereafter she was taken to Neora Railway Station and from there they reached Sarona where the appellant went to her Dadi's place. She was not permitted to go out of her house, even her grand-mother threatened her. She resided there for 4 days and in this period he committed forcible sexual intercourse on 3 occasions though she was not willing. From there they went to Khamtarai in his uncle's house where his uncle advised her to marry which was refused by her. She was rescued by police. Her total statement before the Court is improvement from her diary statement of Ex. D-1 in which she has admitted that she had stated before the police that on 9-8-2004, when she was in her home, her neighbour Prembai called her out of her home and informed that Khilawan is proceeding Raipur whereupon she went from her house on the pretext of going to her Aunty's place and thereafter went with Khilawan to Railway Station, Tilda and from Tilda, she went to Sarona and stayed in the house of his uncle Rikhiram where both of them slept in one room where Khilawan had sex with her. Thus from

her diary statement, it is manifestly clear that she accompanied the appellant of her own freewill to various places.

16. Dr. Shudha Samuel (P.W. 7) who has examined the prosecutrix has stated that on examination of the prosecutrix she did not notice any injury over her person. On internal examination also, her internal parts were healthy and there was no sign of injury over them. Her hymen was old ruptured which admitted two fingers easily and she was habitual to sexual intercourse. It has been already held that the prosecution has failed to prove the age of the prosecutrix beyond all reasonable doubt that she was aged below 18 years at the time of incident. When the age is in doubt then the question of taking her away from lawful guardianship does not arise. Taking or enticing away a minor out of the keeping of the lawful guardian is an essential ingredient of the offence of kidnapping. In the instant case, it is clear from the diary statement of the prosecutrix that she was herself eager and willing to accompany the accused and accompanied him to her own freewill, did not complain to anyone during her stay with accused in various places and therefore, we are of the considered opinion that the trial Court was not justified in convicting the appellant under Sections 363, 366 and 376 of I.P.C. and sentencing him to undergo R.I. for 7 years with fine of Rs. 1000/- on each count.

17. In the result, the appeal succeeds. The impugned judgment of the trial Court convicting and sentencing the appellant as mentioned hereinabove is set aside and the appellant is acquitted of all the charges. He be set at liberty forthwith if not required in any other case.

Sd/-
DHIRENDRA MISHRA
Judge